The Hertz Corporation, d/b/a Hertz Rent-A-Car *and* California Teamsters Public, Professional and Medical Employees Union, Local 911. Case 20–CA–22259

October 21, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On November 21, 1989, the National Labor Relations Board issued a Decision and Order[1] in this proceeding, finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by promulgating, maintaining, and enforcing a rule prohibiting its employees from wearing union steward pins.

The Respondent filed a petition for review with the United States Court of Appeals for the Sixth Circuit. On December 14, 1990, the court remanded the case to the Board for consideration of evidence bearing on the Respondent's enforcement of its uniform policy, and for determination of whether the Respondent's uniform policy was valid pursuant to the Sixth Circuit's test established in *Burger King Corp. v. NLRB*, 725 F.2d 1053, 1055 (6th Cir. 1984).

On February 20, 1991, the Board advised the parties that it had accepted the remand and invited statements of position. The Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered its original decision and the record in light of the court's remand, which the Board accepts as the law of the case, and the parties' statements of position, and has decided to dismiss the complaint.

The facts are not in dispute. In June 1988, the Union furnished steward identification pins to Susan Butler and Doug Harmon, employees at the Respondent's Sacramento, California airport facility. Butler was a courtesy bus driver who had significant customer contact; Harmon was the chief garage attendant who also had some customer contact. The steward pins issued by the Union measured approximately 1 inch by 1-1/2 inch, with gold trim and lettering against a blue background and were inscribed: ''Teamster Steward 911.''

The Respondent provides uniforms for all its employees. In June 1986, the Respondent had issued a dress code pamphlet describing the attire to be worn by its employees. The pamphlet included an accessories provision with anxhaustive list of jewelry that employees were allowed to wear. The Respondent reissued portions of the dress code, including the accessories provision, in February 1988, and on May 1, 1988, it issued a ''Uniform Update'' which, in part, warned that ''[u]nder NO CIRCUMSTANCES'' (emphasis in original) could the Respondent's uniform policy be violated. On October 7, 1988, the Respondent circulated a memo stating: ''Effective immediately, the only acceptable pins to be worn on your outermost garment is your name pin, any current promotional pins that the Hertz Corporation provides and any Hertz award pins. No other pins other than the above is [sic] to be worn.''

Subsequently, Philip Kennewell, the Respondent's Sacramento city manager, directed Butler and Harmon to remove their union steward pins because wearing them was in violation of the Respondent's dress code.

In its original decision the Board found that Section 7 of the Act entitles employees to identify themselves as union stewards and that the pins at issue in this case were acceptable under Board standards. Further, the Board noted that the Respondent failed to show that the presence of the pins on the employees' uniforms interfered with the conduct of either individual employees' jobs or the Respondent's business. The Board considered it unnecessary to reach the issue of whether the Respondent discriminated by allowing employees to wear noncompany pins other then the union steward pins. Accordingly, the Board adopted the judge's finding of an 8(a)(1) violation.

The Sixth Circuit remanded the case because the absence of a conclusion on whether the Respondent engaged in disparate enforcement of its policy precluded the court from determining whether the policy was valid under the Sixth Circuit's *Burger King* test, supra. Under that test, special circumstances warranting prohibition of union pins are present when: (1) an employer maintains a policy that employees wear only authorized uniforms; (2) the employer enforces the policy in a consistent and nondiscriminatory fashion; and (3) the employees restricted by the policy have contact with the public. Having accepted the Sixth Circuit's remand as the law of this case, we are bound by the court's test as it applies to this proceeding. Only the disparate enforcement aspect of the Sixth Circuit's test is now at issue, however.

The administrative law judge found disparate enforcement of the Respondent's dress code policy regarding the wearing of jewelry, citing incidents where employees had worn a Christmas pin, a St. Patrick pin, and green shamrock stickers on their name tags. We disagree with the judge's finding that these incidents were sufficient to constitute disparate enforcement. The record shows that the Respondent took concrete steps to enforce its dress code. For example, Philip Kennewell, the Respondent's Sacramento city manager, told Inge Gallagher to remove a ''Just Say No'' drug button, Wilbur Sellers to remove a ''I might look stupid'' button, and Doug Harmon to remove Air

[1] 297 NLRB 363.

Force patches and flight wings. Although the judge is correct that there were occasional lapses in enforcement, the code was enforced in other instances against the same individuals. Thus, while Susan Butler wore a green shamrock sticker on her name tag for 2 days without incident, the Respondent earlier had told her to remove black earrings. Similarly, while Melissa Humble wore the same small shamrock sticker for 1 day and a Christmas pin for almost 2 weeks without incident, the Respondent previously had told her at least twice to remove her black tennis shoes and to wear the uniform black pumps.

We are persuaded that the occasional lapses in enforcement cited by the judge show only that the Respondent had problems in attempting to carry out its uniform policy effectively. No doubt employee cooperation with the Respondent's comprehensive uniform policy and the Respondent's diligence in enforcing it were less than perfect. Thus, the judge credited Kennewell's testimony that he ignored Butler's and Humble's steward pins on some occasions because he was too busy to reprimand them. Yet these occasional lapses in an otherwise consistent application of a detailed uniform policy do not persuade us that there was inconsistent and discriminatory enforcement.[2] See *United Parcel Service*, 195 NLRB 441, 450 (1972); *Kendall Co.*, 267 NLRB 963, 965 (1983).

Accordingly, pursuant to the terms of the Sixth Circuit remand, we find that, under the Sixth Circuit's *Burger King* test, the Respondent has demonstrated ''special circumstances'' warranting its prohibition of the union steward pins. We therefore dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

I believe that the Respondent failed to demonstrate that it enforces its dress code policy in a consistent and nondiscriminatory fashion regarding the wearing of pins on employee uniforms. Thus, a finding of ''special circumstances'' under the Sixth Circuit's test in *Burger King Corp. v. NLRB*,[1] which I accept as the law of the case, is not warranted, and the Board's earlier finding of an 8(a)(1) violation based on the Respondent's prohibition of union steward pins should be reaffirmed.

The Respondent had a detailed dress code policy covering clothing and accessories, which was clarified in a series of memoranda issued January 1986 through October 1988. On October 7, 1988, the Respondent issued the following memorandum:

> Effective immediately, the only acceptable pins to be worn on your outermost garment is your name pin, any current promotional pins that the Hertz Corporation provides and any Hertz award pins. No other pins other than the above is [sic] to be worn.

On October 11, 1988, the Respondent's city manager, Philip Kennewell, approached employee Susan Butler and asked her to remove her union steward pin. Butler had been wearing this pin every day since June 1988. Kennewell also directed another employee, Doug Harmon, to remove his union steward pin. Both employees complied with Kennewell's directive.

The judge concluded that the Respondent violated Section 8(a)(1) by not permitting Butler and Harmon to wear their union steward pins and found the following evidence of disparate enforcement of the Respondent's dress code policy following the October 7 memorandum regarding the wearing of pins. Employee Melissa Humble wore a green shamrock sticker on her name tag on Friday, March 17, 1989. Employee Susan Butler wore an identical sticker the same day and on the following Monday. Both employees saw and talked to various supervisor during the day, and no supervisor advised either employee to remove her shamrock sticker. Additionally, between December 11 and 24, 1988, employee Humble wore a pin with a red and white Santa hat on top and the words ''I believe in Santa.''

The right to wear union insignia is a right protected under Section 7 of the Act. An employer violates Section 8(a)(1) by restricting employees' right to wear union insignia unless the employer can demonstrate ''special circumstances'' showing that such a rule is necessary to maintain production and discipline. The Board and the courts may disagree as to what constitutes adequate ''special circumstances,'' but there is no disagreement that it is the employer's burden to establish the existence of such circumstances.

Unlike my colleagues, who find that the Respondent's lapses in application of its detailed uniform policy were not sufficient to establish inconsistent and discriminatory enforcement, I consider the evidence to

[2] There is additional record evidence of enforcement lapses that the judge did not make findings nor rely on. This included evidence that a rental representative, a bus driver, and a back-office clerical wore lace-up shoes rather than pumps on various occasions; Melissa Humble had worn a Christmas pin and a St. Patrick's Day pin in the past, and wears four rings currently. Even assuming that this conduct occurred and that it was observed by the Respondent, without reprimand, which is not clear from the record, we draw the same conclusion with respect to these incidents as we do with respect to those discussed above.

[1] 725 F.2d 1053 (6th Cir. 1984), denying enf. to 265 NLRB 1507 (1982). As noted by my colleagues, under the Sixth Circuit's test, ''special circumstances'' exist when three factors are present: (1) the employer maintains a policy that employees wear only authorized uniforms; (2) the employer enforces the policy in a consistent and nondiscriminatory fashion; and (3) the employees who are restricted by the policy have contact with the public. Implicitly finding that factors (1) and (3) were present here, the Sixth Circuit remanded the instant case to the Board for a finding regarding factor (2).

be revealing with respect to the Respondent's conduct. The Respondent was deligent in enforcing its no-pin rule strictly as to union pins and was inconsistent—and perhaps even arbitrary—in enforcing its rule as to non-union pins. I therefore dissent from my colleagues' dismissal of the complaint.